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In the Supreme Court of the United States

October Term, 1993

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WELFARE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, MEMBERS OF THE STATE FOOD STAMP APPEALS BOARD, ADMINISTRATOR OF THE FOOD AND NUTRITION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, AND THE REGIONAL ADMINISTRATOR OF THE NORTHEASTERN REGIONAL OFFICE OF THE FOOD AND NUTRITION SERVICE, U.S. DEPARTMENT OF AGRICULTURE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

1. May the United States Department of Agriculture impose a monetary penalty upon the States under Section 16(g) of the Food Stamp Act of 1971, as amended 7 U.S.C. §2025(g) (1981), by using a concededly biased method that systematically results in higher average penalties than allowed in the statute?

2. Is a food stamp penalty "incurred" for fiscal year 1982 within the meaning of the General Savings Statute, 1 U.S.C. § 109, when additional events necessary to liability have not occurred by the effective date of the repeal of statutory authority for that penalty?

ISSUES PRESENTED

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The Commonwealth of Massachusetts, on behalf of its Department of Public Welfare, petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit, entered in this case on January 22, 1993.

The opinion of the Court of Appeals is reported at 984 F.2d 514 and is reproduced in Petitioner's Appendix A ("Pet. App."). The decision of the Court of Appeals on petition for rehearing and suggestion for rehearing en banc is reported at 984 F.2d 527 (Pet. App. D). The two decisions of the United States District Court for the District of Massachusetts are reported at 737 F. Supp. 120 and 788 F. Supp. 1267 (Pet. App. B and C).

JURISDICTION

The judgment of the U.S. Court of Appeals for the First Circuit was entered on January 22, 1993, and rehearing was denied on March 9, 1993. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1988 ed.). The District Court had jurisdiction over this case pursuant to 7 U.S.C. § 2023, 28 U.S.C. § 1331 and 28 U.S.C. § 2201. The United States has waived its immunity in 5 U.S.C. § 702 and 7 U.S.C. § 2023.

STATUTORY PROVISIONS INVOLVED

1 U.S.C. § 109. Repeal of statutes as affecting existing liabilities

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for

the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

7 U.S.C. § 2025(g)

(as in effect in FY 1982)
(as added by Pub. L. No. 96-249, 94 Stat. 357, 364) (May 26, 1980).

(1) The Secretary shall institute an error liability program under which each State agency shall, other than for good cause as determined by the Secretary, pay to the Secretary or have withheld by the Secretary as described in paragraph (4) of this subsection, the amount by which the dollar value equivalent of the State agency's payment error rate, as determined by the Secretary, for each six-month period, exceeds the dollar value equivalent of either --

(A) the State agency payment error rate for the base period less a national annual rate of error reduction, as determined by the Secretary, taking into account

program circumstances and rates of error reduction in comparable Federal or federally assisted public assistance programs, or

(B) the national standard payment error rate for the base period, whichever is higher.

(2) As used in this subsection. (A) "base period" means, for fiscal year 1981, the six months beginning October 1, 1979, and ending March 31, 1980 and, for each fiscal year thereafter, the six months beginning October 1 and ending March 30 of the prior fiscal year; (B) "payment error rate" means the percentage of all food stamp allotments which are issued in a given period by a State agency to households that fail to meet the eligibility requirements of sections 5 and 6 of this Act, are overissued to eligible households, and are underissued to eligible households; (C) "national standard payment error rate" means the weighted mean payment error rate for all State agencies; and (D) "dollar value equivalent" means the value of allotments determined by multiplying a given error rate by the dollar value of all the allotments issued by a State agency during the particular period in question.

7 U.S.C. § 2025(d)
(effective October 1, 1982)
(as added by Pub.L. No. 97-253, § 180, 96 Stat. 782) (Sept. 8, 1982)

(1) As used in this subsection, the term "payment error rate" means the total percentage of all allotments issued in a fiscal year by a State agency which are either--

(A) issued to households which fail to meet basic program eligibility requirements; or

(B) overissued to eligible households.

(2) (A) The Secretary shall institute an error rate reduction program under which, if a State agency's payment error rate exceeds--

(i) 9 per centum for fiscal year 1983,

(ii) 7 per centum for fiscal year 1984, or

(iii) 5 per centum for fiscal year 1985 or any fiscal year thereafter,

then the Secretary shall, other than for good cause shown or as provided in subparagraph (B), reduce the State agency's federally funded share of administrative costs provided pursuant to subsection (a), other than the costs already shared in excess of 50 per centum under the proviso in the first sentence of subsection (a) or under subsection (g), by the amounts required under paragraph (3).

STATEMENT OF THE CASE

1. Procedural History

This litigation challenges a penalty imposed by the Food and Nutrition Service of the U.S. Department of Agriculture ("FNS") for alleged errors in administering the Food Stamp program during the second half of federal fiscal year 1982. On November 30, 1984, FNS notified Massachusetts of a Food Stamp error rate liability of $1,585,034 for the period April through September 1982. See Pet. App. B-7.

Massachusetts submitted to FNS a request for a determination that it had good cause for failing to meet the target error rate, because it experienced significant caseload growth, because changes in Food Stamp and other

programs had a substantial adverse impact upon the State's management of the Food Stamp program, and because Massachusetts made good faith efforts to reduce its error rate. Pet. App. A-45. The Commonwealth was notified of an administrative denial of the request on July 15, 1985, and was billed for the total amount on August 16, 1985. See Id.

Massachusetts appealed the penalty to the State Food Stamp Appeals Board ("Board"). Pet App. A-3. The Board heard the appeal on March 27, 1986. In a decision dated June 20, 1986, it upheld $1,368,893 of the penalty, after certain mathematical errors had been corrected. Pet. App. B-7.

On July 18, 1986, the Commonwealth initiated this action in federal court to overturn the remaining penalty

pursuant to Section 14 of the Food Stamp Act, 7 U.S.C. § 2023, which entitled the Commonwealth to a trial de novo on all issues.[8/] Pet. App. A-3. The Commonwealth also sought declaratory relief.

The District Court heard summary judgment motions on two occasions. On April 27, 1990, it denied the

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8/ Meanwhile, FNS' regional office informed its national office of the need to lower Massachusetts' rate to 16.35% on April 20, 1986, well before FSAB's June 20, 1986 decision. Pet. App. C-9 FNS did not disclose this information to Massachusetts -- or the FSAB -- until July 25, 1990 -- over four years later. Massachusetts' error rate for the period in question was finally lowered to 16.35% in 1990. Id. The target rate had also been raised to 14.88%, thus reducing the penalty slightly once again. Pet. App. C-8. The overall effect of these two changes was about $45,000.

Commonwealth's motion for partial summary judgment. Commonwealth of Massachusetts v. United States, 737 F. Supp. 120 (D. Mass. 1990), Pet. App. B. On April 6, 1992, it resolved the remaining issues in favor of the defendants and entered judgment accordingly. 788 F.Supp. 1267, Pet. App. C. The latter decision addressed both of the Commonwealth's arguments, presented in this petition.

On January 22, 1993, a panel of the Court of Appeals affirmed the District Court's two decisions entering summary judgment for the United States. 984 F.2d 527, Pet. App. A. On the first issue involved in this petition, the court agreed--as FNS had conceded--that, under the statistical procedure used by FNS, "the risk of error causes the

penalty provision to weigh more heavily on the states than on the federal government." Pet. App. A-24. Nevertheless, the Court held that this bias did not violate the controlling statute and was not an abuse of discretion. On the second issue included in this petition, the court held that the General Savings Statute, 1 U.S.C. § 109, permitted FNS to impose the underlying penalty following repeal of the statutory penalty provision.

The Commonwealth filed a timely petition for rehearing and suggestion for rehearing en banc. On March 9, 1993, the panel denied the petition for rehearing, and the suggestion for rehearing en banc was denied. Pet. App. D-1 to 2.

2. Calculation of Food Stamp Error Rate Penalties

FNS administers the Food Stamp Program at the federal level. Participating States are responsible for certifying eligible households and arranging for the distribution of monthly benefits. Pet. App. B-3. The Commonwealth of Massachusetts Department of Public Welfare ("Department") is the responsible agency in Massachusetts. Pet. App. C-5 to 6. The federal government pays at least 50 percent of eligible State and local administrative expenses. 7 U.S.C. § 2025.

For the relevant period (the second half of Federal Fiscal Year 1982), FNS was authorized to reduce a State agency's share of federal administrative funding upon a finding of State agency

failure to meet the statutory target for error-free claims processing and benefit determination. 7 U.S.C. § 2025(d); 7 C.F.R. § 275.25(e)(4)(ii)(1982). The target, itself, is a statistical estimate. Pet. App. C-8.

In order to determine alleged non-compliance with target error rate requirements, FNS calculates the State's payment error rate. Pet. App. A-6. The error rate is a statistical estimate designed to reflect the frequency and severity of cases in which FNS contends that the State Food Stamp agency erroneously distributed or failed to distribute Food Stamps to households. Id.

The error rate is derived from two separate calculations, which are then combined through statistical

manipulations. Id. Initially, the State agency -- here the Department -- selects a sample of cases which it reviews to determine if the cases were correctly decided by the case worker. 7 C.F.R. §§ 275.10-.11. The Department's reviewers count an error where they find that a case worker determined a family to be eligible when it was not, authorized payments in excess of those to which the family was entitled, or underpaid the family. The Department reports this information to FNS, which calculates an error rate. Pet. App. A-5 to 6.

FNS then reviews for accuracy a subsample of the State's sample. 7 C.F.R. § 275.3. The State and Federal reviews are ultimately combined and are used in a statistical regression formula

in order to calculate the State's error rate. 7 C.F.R. § 275.25.[9/] This error rate is an estimate of the errors present in the State's entire Food Stamp caseload. Pet. App. A-6.

The estimated error rate is then compared to the estimated target rate in order to determine the State's liability, if any, and the amount of any penalty to be imposed for exceeding the target (id.). If the estimated error rate exceeds the target, the state must

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9/ As it reviews the federal subsample, FNS may determine that a case which the State has found to be correct is an error. If so, there is a "federal difference," which, if the state wishes to challenge the federal finding, is resolved by an arbitration review procedure. 7 C.F.R. § 275.3(c)(4). Such "federal differences" are used in the combined analysis.

pay a penalty. 7 C.F.R. § 275.25. For FY 1982, the penalty was calculated as a percentage of total food stamps issued. 7 C.F.R. § 275.25(d)(3) (1982).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION AUTHORIZING USE OF BIASED METHODOLOGIES RAISES ISSUES OF NATIONAL IMPORTANCE AND CONFLICTS WITH A DECISION OF THIS COURT.

This petition raises the question whether a federal agency may estimate a statutory quantity through a biased method, to the detriment of the States. The question is increasingly important as statistics become a more and more frequent technique in administrative and judicial fora to prove adjudicative facts or to estimate statutory quantities.

The Commonwealth argued below that "FNS' sampling methodology was so biased as to offend the Food Stamp Act." Pet. App. A-8. The Court of Appeals acknowleged that, mathematically, the Commonwealth's argument that bias inheres in FNS' methodology "appears to hold water." Pet. App. A-24. As FNS admits, its method of assessing error rate sanctions has a systematic bias:[10/]

> The state liability that is assessed is biased in the sense that if the true error rate were known instead of being estimated from a sample the assessment would be lower on the average.

(1st Cir. App. 300)(emphasis added). Both the "error rate" and the liability

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[10/] To use another phrase preferred by some statisticians, FNS' method is "statistically unfair" (1st Cir. App. 1260, 1272).

are statutorily defined quantities. 7 U.S.C. § 2025(g)(1),(2). Accordingly, the bias acknowledged by FNS constitutes a substantial deviation from the Congressional mandate that liability be based upon the error rate.11/ The Commonwealth raised the issue whether the relevant statute and principles of administrative law permit such a biased system to be employed to the prejudice of the Commonwealth and the amici States.

The Court of Appeals' decision, answering in the affirmative, raises troubling questions. First, the panel

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11/ The Commonwealth's evidence (which must be taken as true on summary judgment) was that the bias in this case amounts to at least 85.7 percent of the penalty and, by some calculations would exceed 100 percent of the penalty (1st Cir. App. 808).

ignored precedent of this Court, which prohibits the use of statistical procedures that do not evenhandedly estimate the statutory quantity. Rosado v. Wyman, 397 U.S. 397 (1970). Second, the panel believed that States' error rates are to be "determined by the Secretary" (Pet. App. at A-28 to 29, citing 7 U.S.C. § 2025(g)(1981)), but overlooked the limitation upon agency discretion stated by Congress in the statutory definition of the "error rate" itself, appearing in 7 U.S.C. § 2025(g)(2)(B)(1981). Finally, the panel's decision is apparently the first decision in the country setting forth the troubling proposition that an agency may lawfully establish a system that places "the risk of error"--i.e. the risk of penalties in excess of the

statutory amount--more heavily upon the targets of a claim (here, the States) and less upon the agency that seeks to calculate, impose and collect the claim.

The 13 amici States that filed a brief in the Court of Appeals demonstrated that the problem of systematic upward bias in penalties confronts any State that faces FNS penalty assessments, and thus is of wide public importance. See "Notice of Change in Interest of Amici Curiae," filed in the Court of Appeals dated January 22, 1993. As that filing indicates, "all of the amici States face the possibility, in the future, of being penalized for the years following FFY 1991." Nor is the food stamp program the only federal program raising a similar problem. For instance, the

Department of Health and Human Services' ("HHS") Medicaid disallowance procedures contained a penalty bias, much like the one in FNS' system. HHS recognized that the use of biased or otherwise statistically invalid methodologies contravened the governing statutes and could not be the basis for imposition of monetary penalties against States. See Department of Health and Human Services, Departmental Appeals Board, Appellate Division, FY 1981 Medicaid Quality Control Disallowances, Docket Nos. 90-86, 90-87, 90-88, 90-89, Decision No. 1332 (May 26, 1992).

In short, Court of Appeals' decision will provide a basis for unbridled agency discretion to impose significant and systematically

upwardly-biased penalties, in spite of statutory mandates.

A. By Authorizing the Use of Biased Statistical Methods, The Decision Below Raises Questions Of National Importance, Involving the Fidelity of Administrative Agencies To Clear Statutory Commands.

The decision in this case raises issues of national importance in ensuring that statistical methods do not mask non-compliance with law. Both the District Court (Pet. App. C-18) and the Court of Appeals (Pet. App. A-24) have now acknowledged the existence of a systematic bias against the States in FNS' method for calculating penalties. Neither has suggested that it is impossible or impracticable to remove

the bias.[12] The decision below therefore stands for the proposition that, in purporting to implement a statute, an agency may choose a method that produces higher penalties than contemplated by statute and that, the agency concedes, systematically disadvantages litigants against whom it asserts claims for monetary relief.

Analysis in this case, as in other penalty cases, begins with the statutory definition of the penalty. Congress defined and limited the penalty that FNS could impose upon states by mandating that each penalty be based upon the "State agency's payment error rate." 7

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[12] The Commonwealth's brief below (pp. 16-22) demonstrated that removal of the bias is eminently possible by any number of methods the Secretary might choose.

U.S.C. § 2025(g)(1), as added by P.L. 96-249, 94 Stat. 364-365 (May 26, 1980). That rate was defined as "the percentage of all food stamp allotments which are issued in a given period by a State agency to households that fail to meet the eligibility requirements of sections 5 and 6 of this Act, are overissued to eligible households, and are underissued to eligible households." 7 U.S.C. § 2025(g)(2)(B). (emphasis added). By definition, a penalty calculated on the basis of "all" allotments, as the statute requires, is the penalty that would result if the error rate were measured without error (1st Cir. App. 300, ¶ 12; 797, ¶ 7). See also House Report No. 96-788, 96th Congress, 2d Sess., p. 73, reprinted in 1980 U.S. Code Cong. & Admin. News 906.

Congress therefore intended penalties in an amount that reflects "all allotments"--which is precisely what the FNS conceded its method does not do. See quotation at p. 16, above; see also 1st Cir. App. 781-82, 1280-81, 1283, 1525, 1531. Congress' limitation upon the Secretary's selection of an error rate brings into sharp focus the harm done to Congressional intent when an agency selects a method that effects biased estimates of statutorily defined penalties.

FNS conceded that:

> the average assessed liability for a state will be greater than the liability that would be assessed if the true error rate were known.

1st Cir. App. 784, 1078-1079, 1283. If the Court of Appeals' decision is allowed to stand, then the use of

statistics enables agencies to do indirectly what they may not do directly, namely adopt a rule that systematically tends to increase penalties significantly beyond statutory limits.

The implications of this principle for a society that relies increasingly upon statistics for administrative and judicial determinations are serious. Congress cannot know that its intent will be carried out. Administrative agencies may exceed the limits that legislators expected would be followed.[13/]

13/ The Commonwealth recognizes that its own agencies could someday be the beneficiaries of a rule that permits this sort of discretion, but believes that principled adherence to law requires application of a more even-handed rule.

This case illustrates these problems well. The basic point is that FNS has done nothing to remedy a situation in which, it concedes, the estimated liability is biased significantly upwards. FNS has no discretion to calculate a penalty that systematically exceeds the statutory standard set forth in 7 U.S.C. § 2025(g). See Commonwealth of Massachusetts v. Yeutter, 947 F.2d 537, 546 (1st Cir. 1991)(the statutory language and legislative history control the degree of judicial deference owed to the Secretary of Agriculture). To maintain a concededly biased system for the purpose of imposing a penalty of

over $1.3 million upon Massachusetts and large amounts on other States as well, without attempting in any way to adjust the system in order to correct this removable bias, is contrary to law and must be reversed. Otherwise, there are no meaningful safeguards to insure that use of statistical evidence accurately reflects Congressional intent, and there will effectively be no judicial review for agency compliance with statutorily mandated penalty provisions in cases like this one.

The Court of Appeals' suggestion (Pet. App. A-29) that an unbiased penalty system "could well prove less of a deterrent to administrative errors" is a principle without limit; increasing penalties--even beyond statutory authorization--could often be thought a

greater (though illegal) deterrent. Congressional intent to limit the penalty amount is apparent in the statute. The panel's unelaborated comments about administrative concerns (Pet. App. A-29) do not justify an agency's departure from statutory limits.

B. The Decision Below Conflicts with a Decision of This Court.

In Rosado v. Wyman, 397 U.S. 397, 419-20 (1970), this Court required New York State to use statistically "fair" and unbiased statistical averages to determine its standard of need for AFDC recipients under Section 402(a)(23) of the Social Security Act Amendments of 1967. New York had effectively reduced benefits by changing its method of

computation. While declining to preclude New York from, "consistently with the federal statutes, consolidat[ing] items on the basis of statistical averages," the Court stated the conditions that such an averaging would have to meet:

> Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistently with § 402 (a)(23) redefine its method for determining need.

Id. at 419. Since New York's system did not do so, its statistical methodology was held invalid. Id.

The Supreme Court's references in Rosado to "fair averaging" and "fairly priced" "apply to the technical statistical process rather than to any qualitative review of the components of the averages." New Jersey Welfare

Rights Organization v. Cahill, 349 F. Supp. 501, 510-11 (D.N.J. 1972), aff'd, 483 F.2d 723 (3d Cir. 1973). In other words, "fairness" can and must be evaluated as an objective, statistical matter. (See 1st Cir. A pp. 1272). The presence of a significant and avoidable systematic bias in a known direction is statistically "unfair" and therefore invalid under Rosado. See also Roselli v. Affleck, 373 F. Supp. 36, 43 (D.R.I.), aff'd, 508 F.2d 77 (1st Cir. 1974); Houston Welfare Rights Organization v. Vowell, 555 F.2d 1219, 1226-27 (5th Cir. 1977), rev'd on other grounds sub nom. Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). Cf. Illinois Physicians Union v. Miller, 675 F.2d 151, 156 (7th Cir. 1982) (court found that the risk of

error was assigned symmetrically and thus sustained procedure).

The existence of a systematic bias imposing higher penalties than Congress mandated, as in this case, violates the rule of statistical "fairness" and "accura[cy]" set forth in Rosado. It is also fundamentally inconsistent with every justification for judicial acceptance of "fair" statistical methods. While administrative efficiency justifies use of statistical methods--with the potential for some inaccuracy in a particular case--this is only acceptable if "any arbitrariness evens out in the long run." Chaves Country Home Health Service v. Sullivan, 931 F.2d 914, 919 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1160 (1992), quoting 732 F. Supp. at 189-90.

By acknowledging that the Commonwealth's mathematical arguments "hold water," the Court of Appeals acknowledged that FNS' method does not even out in the long run. It also accepted the proof that other, unbiased methods were possible. If a statistical method does not even out in the long run and unbiased alternatives exist, any possible legal basis for acceptance of the biased method vanishes.

Rosado expressly rejected administrative efficiency alone as a rationale for imposing significantly biased statistical methods:

> While [the federal statute] does not prevent the States from pursuing what is beyond dispute the laudable goal of administrative efficiency, we think Congress has foreclosed them from achieving this purpose at the expense of significantly reducing the content of their standard of need.

Rosado, 397 U.S. at 417.

Instead of applying the above principles, the Court of Appeals applied another, wholly inapposite line of authority relating to a non-statistical notion of "fairness." Pet. App. A-26 to 28. But the Commonwealth does not attack FNS' procedures based upon some subjective or qualitative notion of fairness. Rather, the Commonwealth has always stated that Rosado's references to "fair averaging" and "fairly priced" relate to "the technical statistical process." Id., citing Cahill, supra; Roselli, supra.

The Court of Appeals' opinion now stands for the proposition that a bias in administering a statute is lawful, even when the resulting penalties will systematically exceed what Congress

intended. This proposition cannot be allowed to stand. It is irreconcilable with Rosado, and with the fundamental preposition that it is Congress, and not the administrative agency, that specifies the extent of and the limits upon the imposition of penalties upon the states.

II. THE ERRONEOUS APPLICATION OF 1 U.S.C. §109 TO OVERCOME THE REPEAL OF STATUTORY AUTHORITY TO IMPOSE PENALTIES ALSO RAISES AN ISSUE OF NATIONAL IMPORTANCE.

The Court of Appeals held that FNS retained authority to impose a penalty in this case for April-September 1982, notwithstanding the repeal in 1982 of statutory authority to do so for fiscal year 1982. In construing 1 U.S.C. § 109 so broadly as to permit penalties in the face of statutory repeal, the decision

below raises another issue of national importance.

The penalty in this case was imposed by FNS in 1986 under Section 16(g) of the Food Stamp Act, 7 U.S.C. § 2025(g) (1981 ed.). At that time, the statute authorized quality control penalties only for fiscal years 1983 and later. It did not authorize penalties for periods prior to fiscal year 1983, and all authority for imposing such penalties was revoked in 1982 by P.L. 97-253, 96 Stat. 728. FNS thus had no authority to impose this penalty for the period April through September 1982.

The United States relied below upon the repealed Section 16(g) of the Food Stamp Act and upon 1 U.S.C. §109. These provisions afford no support for FNS' argument, however. Section 16(g) was

repealed in 1982 and replaced with the statutory scheme quoted above, which did not authorize penalties for fiscal year 1982 and before. In the Omnibus Budget and Reconciliation Act ("OBRA") of 1982 P.L. 97-253, § 180, 96 Stat. 782, Congress amended Section 16 of the Food Stamp Act, 7 U.S.C. § 2025, by "striking out subsections (d), (e) and (g)," (emphasis added), and inserting in their place a new statutory scheme. The Act was signed on September 8, 1982 and took effect on October 1, 1982. P.L. 97-253, § 193(b), 96 Stat. 789. The new statute expressly provided for penalties only beginning in Fiscal Year 1983. There was no provision preserving prior authority as to fiscal year 1982 or before. Thus, as of October 1, 1982, Congress established a new system of

penalties and goals, without giving the Secretary power to impose penalties for earlier periods.

Even if the clear statutory language left any room for argument, the legislative history shows that Congress believed the old system to be unduly harsh, where applied, and ineffectual, where good cause was determined to exist. The new bill was designed to correct the seriously flawed system created by the former Section 2025(g):

> In setting up a system of administrative cost penalties, the Committee has corrected the second major flaw in the existing system. The current penalty (i.e., full liability for the cost of erroneous payments above certain levels) has proven difficult to apply in practice because of the relatively large amounts involved and, as a result, the Secretary has chosen to waive its application. The sanctions established in the Committee's proposal, on the other

> hand, are more realistic and should not be waived except when unusual circumstances intervene.

S. Rep. No. 97-504, 97th Cong., 2d Sess. 70-71, reprinted in 1982 U.S. Code Cong. & Admin. News, 1641, 1708-09. The new system was to "replace the current system of sanctions and incentives . . . with a new set of sanctions and incentives," not to supplement it. Id. at 69, 1982 U.S.C.C.A.N. at 1707, 1736. It completely overhauled the old system which had proven "unrealistic" and unfair. To reinstate the repealed former Section 2025(g) would continue the unrealistic, excessive, and ineffective approach that Congress rejected in OBRA of 1982. Neither the statutory language nor the legislative history warrant such an approach.

Nor does 1 U.S.C. § 109, the other authority relied upon by FNS, permit imposition of the penalty. That section provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. . . . (emphasis added).

The application of this statute depends upon whether the error rate penalty was "incurred" before the earlier version of §2025 was repealed.

The Court of Appeals held that Massachusetts incurred its liability when the errors were made, even though the facts necessary for a "good cause" determination had not occured and, as a

matter of law, could not have occured by the effective date of the statutory repeal, October 1, 1982. That holding conflicts with this Court's statements that a liability is "incurred" under a savings clause when "the occurrence of no other fact or event was essential to the imposition of a liability" and "the ultimate obligation to pay" is "certain and fixed." Hertz v. Woodman, 218 U.S. 205, 220, 221 (1910).

There is no liability to be saved under Section 109, as the obligation was not certain and fixed prior to the repeal. Id. at 224. The timing of events in this case demonstrate the Court of Appeals' error in interpreting the statute, in light of this Court's precedent.

The events necessary to the *imposition of liability upon the* Commonwealth did not occur -- and could not have occurred -- in 1982. Under 7 C.F.R. § 275.25(d)(5)(i)(G), a State's good faith efforts to reduce its error rate is a ground for a determination of good cause, which precludes liability. One aspect of the inquiry under this provision was whether "error rate reduction has begun to result after the conclusion of the QC measurement period." Id. (emphasis added). The regulation provided: "Substantial weight shall be given to the achievement of results stemming from the State's efforts." Id. Results from the State's efforts would not even begin to appear until after October 1, 1982.

Likewise, one element of the separate automatic good cause determination provision in FNS' regulations was that the State meet certain error rate reduction goals for the "comparable period(s) of the succeeding fiscal year." 7 C.F.R. §275.25(5)(G)(2)(i). Liability therefore could not be incurred until well after October 1, 1982.

Because the state's performance "after" the penalty period and in the succeeding fiscal year could not occur until after the penalty period, the State could not "become liable" for (i.e., incur) a penalty for FFY 1982 until well after October 1982. Since FNS' authority to impose a FY 1982 penalty was repealed effective October 1, 1982, long before Massachusetts'

alleged liability was incurred, 1 U.S.C. § 109 has no application.

In addition, Section 109 must be read against the background of the common law. Under the common law, repeal of a penalty statute abates any pending penalty thereunder.[14/] Section 109, which reverses this basic common-law rule, must be strictly construed (cf. Midatlantic National Bank v. New Jersey Dept. of Environmental

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14/ See, e.g., The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1802) (Marshall, C.J.) (followed and quoted in Hamm v. City of Rock Hill, 379 U.S. 306, 312 (1964), Bell v. Maryland, 378 U.S. 226, 231, n.2 (1964), and Gulf, C. & S.F. Ry. v. Dennis, 224 U.S. 503, 506 (1912)); United States v. Chambers, 291 U.S. 217, 223 (1934); United States v. Tynen, 78 U.S. (11 Wall.) 88, 92-95 (1871); Yeaton v. United States, 9 U.S. (5 Cranch) 281, 283 (1809) (Marshall, C.J.).

Protection, 474 U.S. 494, 501 (1986)).[15/]

In short, Section 16(g) was expressly preserved only through September 30, 1982, and 1 U.S.C. § 109 gives it further life thereafter solely with respect to liabilities that had been incurred by that date. Massachusetts' liability had not, and that is the beginning and end of this case. The Court of Appeals' decision

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15/ Whether Congress had any specific intent, in repealing a statute, to work an abatement of liabilities is irrelevant. See, e.g., Hamm v. City of Rock Hill, 379 U.S. 306, 313-14 (1964). But in fact, the evidence is that here Congress did intend to eliminate pre-FFY 1983 penalties because the "large amounts involved" had proven not to be "realistic." S. Rep. No. 97-504, 97th Cong., 2d Sess. 69, 70, reprinted in 1982 U.S. Code Cong. & Ad. News 1641, 1707, 1708.

construing 1 U.S.C. § 109 broadly would permit imposition of penalties contrary to Congressional mandate and therefore raises an issue of national importance.

CONCLUSION

This Court should grant the writ of certiorari to review the decision of the First Circuit Court of Appeals.

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